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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1062

ROBERT A. SCHMITZ, *Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. and HENRY H. FOWLER, Secretary of the Treasury of the United States of America, *Respondents.*

HERMAN A. SCHMITZ, ROBERT A. SCHMITZ and LLOYD J. VAIL, Executors of the Estate of Dietrich A. Schmitz, deceased, *Petitioners,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. and HENRY H. FOWLER, Secretary of the Treasury of the United States of America, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SOCIETE INTERNATIONALE, ETC. IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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QUESTION PRESENTED

The question presented by petitioners is not stated completely or fairly. It fails to state that the indemnification fund cannot be distributed to respondent So-

ciete Internationale, etc. (Interhandel) until such time as the Attorney General, in his unfettered discretion, determines that the interests of the United States no longer require that the fund be retained in the United States Treasury as security to protect the United States against loss.[1]

The real question presented is whether petitioners' cases are different in any material aspect from cases in which this Court and the Court of Appeals have enunciated principles which by now are well and long established.

COUNTERSTATEMENT OF THE CASES

Petitioners' "Statement of the Cases" is bottomed upon the averments of the two complaints. While it is true that controverting answers were not filed by this respondent, its motions to dismiss and/or to quash service of process were supported by affidavits in which this respondent denied every material averment upon which petitioners relied to support their respective claims for relief (R. 15-17, 19, 36-42).

The district judge did not find it necessary to resolve the conflict between the parties as to the *factual basis*

[1] Petitioners' "Question Presented" concludes with the statement that they are precluded from "the effective litigation" of their claims. On January 11, 1967, petitioners instituted new suits against this respondent in the District of Columbia (Civil Action Nos. 85-67 and 87-67) and on January 19, 1967 effected *in personam* service of process on John J. Wilson as Interhandel's agent, pursuant to the ruling in *Kelberine* v. *Societe Internationale, etc.*, — U.S. App. D.C. —, 363 F. 2d 989, cert. denied, 35 U.S. Law Week 3210, December 12, 1966, — U.S. —, 17 L. Ed. 2d 450, pet. to reh. denied, 35 U.S. Law Week 3254, January 23, 1967, — U.S. —, 17 L. Ed. 2d 688.

for the existence of an equitable lien (R. 54).[2] Instead, by reason of the status of the fund in the Treasury, Judge Pine decided that no equitable lien could exist as a matter of law.

REASONS FOR DENYING THE WRIT

No novel questions are presented.

The instant petition is actually directed at the respondent Secretary of the Treasury. Respondent Interhandel's position is subordinate to and dependent upon the status of the United States Government. This respondent will not encroach upon the area of the respondent Secretary's contentions, other than to state that it fully agrees with them.

The district judge's opinion is dispositive of all of petitioners' arguments. He examined the Settlement Agreement between Interhandel and the Attorney General (R. 59, esp. Sections VIII and IX, R. 66-69), outlining the indemnity features and the discretionary functions of the Attorney General, just as the Court of Appeals did in *Kelberine* v. *Societe Internationale, etc., supra.* Then Judge Pine discussed the well known line of cases in this Court and the Court of Appeals[3]

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[2] Interhandel had argued below that in the face of the sworn denials averments of the complaints could not be accepted as true. See *KVOS* v. *Associated Press*, 299 U.S. 269, 81 L. Ed. 183 (1936); *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178, 80 L. Ed. 1135 (1936); and *Chase* v. *Wetzlar*, 225 U.S. 79, 56 L. Ed. 990 (1912). A case squarely in point, and to the same effect as the foregoing cases, is *Spears* v. *Spears*, 162 F. 2d 345 (6th Cir. 1947), cert. den. 331 U.S. 790, 91 L. Ed. 1819 (1947).

[3] *Houston* v. *Ormes*, 252 U.S. 469, 64 L. Ed. 667 (1920); *Mellon* v. *Orinoco Iron Company*, 266 U.S. 121, 69 L. Ed. 199 (1924); *Doerschuck* v. *Mellon*, 60 App. D.C. 383, 55 F. 2d 741 (1931); and *McCormack* v. *Harrah*, 60 App. D.C. 260, 51 F. 2d 316 (1931).

and applied their principles to the cases at bar in the following two paragraphs (R. 51-52):

> "Over the years there have been a number of actions of a similar character which have been filed in this court seeking to impress an equitable lien on a fund in the United States Treasury. Several have been taken to the Court of Appeals, and two to the Supreme Court. [The Judge then cited the four cases appearing in footnote 3 to this brief] It would needlessly burden this Opinion to discuss these cases separately, because the principle of law announced therein is unvarying and identical, and it is this: In order to impress an equitable lien upon a fund in the United States Treasury, it is necessary that there exist several elements, namely, the Treasury officials must be charged with the performance of no duty other than the ministerial duty of making disbursement of the fund. It must be such a duty as could be compelled by mandamus, or a receivership. The United States must not be in the position of a debtor or creditor, but the fund must be an especially earmarked account to which the Treasury officials are under no other responsibility than that of the ordinary stakeholder, and the United States must have no claim or interest in the fund.
>
> "Applying these principles to the instant case, there would seem to be no doubt that these necessary elements are lacking. Here the United States has a direct and real interest, namely, the retention of the fund to indemnify it and certain federal officials from liability arising out of the sale of GAF stock. Here the defendant Secretary has no right to make any disposition of the fund except upon the order of the Attorney General. Here the Attorney General is not a party to the suit, and if he were, clearly his duties in connection with the fund are not ministerial but involve discretion. Here neither the United States nor defendant Sec-

retary is a mere stakeholder, but he is holding the funds for the benefit of the United States. Here the action is clearly one against the United States which has not consented to be sued."

Judge Pine's clear and simple reasoning reflects not only that the lower courts' decisions are *not* wrong, but that these cases do not involve any novel phase of the attempted use of mandatory action to attach funds in the hands of the United States Government. See *Kelberine* v. *Societe Internationale, etc., supra.*[4]

CONCLUSION

The petition should be denied.

Respectfully submitted,

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[4] Petitioners' effort to distinguish *Kelberine* is without merit. True, no equitable lien was asserted in that case, but the Court of Appeals held that the plaintiffs there could not maintain their suit against the government-official defendants because of its non-consented character and the discretionary functions involved. This is the threshold question here; and because of these principles, no equitable lien can be asserted against the fund in the Treasury. Hence, the same result is reached even if petitioners' allegations constitute a *factual basis* for an equitable lien.